



in investigating the calls, and phony company names and other brick walls thrown up by wary telemarketers and sellers.

In my experience, floods of prerecorded calls come in waves of one or more vertical markets, one of which is satellite television service. These calls – as many as 20 per day to my single residential telephone number – almost always contain bogus Caller ID information and no identification whatsoever within the prerecorded message.

The only way to identify the responsible party behind such calls is to play along as an interested consumer and see who you are connected to, or who bills your credit card<sup>1</sup>. Many of the prerecorded calls involve third-parties that perform the dialing, and then when an interested party is on the line (indicated by pressing a specified digit on the dial-pad), the call is “hot transferred” to the client company who is actually selling the product or service. When these companies started getting a large number of “junk responses” from consumers who initially feigned interest in order to make a do-not-call request or otherwise complain, the dialer companies began first transferring prospects to their own internal call center to further “pre-qualify” the called parties before transferring the calls to the client seller.

I quickly learned that invariably the call is immediately disconnected at the first sign that the called party is only interested in identifying the caller, or otherwise asks too many questions. Not only is this the case with the dialer companies’ screeners, but also once the consumer is transferred to the seller. Indeed, I often have to actually make a purchase and see who charged my credit card to identify the caller, because all of the parties involved are very wary of people playing along in order to make an identification.

Usually when I am sufficiently far along in the process with the seller, I make some comments or ask some questions about the prerecorded calls. Almost always, it becomes crystal clear that the employees of the seller are fully aware that they are receiving calls that have been transferred from a call initiated by a prerecorded message. Further, when I talk to management personnel at these very same companies, they, too, almost always indicate no surprise as to the nature of the calls if they don’t outright acknowledge them. However, once confronted about the unlawful nature of the calls and that I intend to do something about it, they often backtrack and feign ignorance, claim they are “only buying leads” or otherwise disclaim any liability for the calls.

The irony of the instant proceeding is palpable in that Dish Network and DirecTV are the poster children of the bad actors trying to continue to reap the benefits of unlawful telemarketing calls while hiding behind third-parties.

### **MY EXPERIENCES WITH DISH NETWORK**

In my first (and admittedly naive) experience with Dish Network, after receiving anonymous prerecorded calls to my home promoting satellite television service, I played along with the recorded sales pitch by pressing “1” on my telephone when instructed. In the interval before being transferred to a live agent, a recorded message stated “thank you for your interest in Dish Network.” Upon speaking to the agent, I asked as to the identity of the company and was again told that the company was “Dish Network”. After further investigation, I discovered that the call was actually placed by an authorized dealer, who happened

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<sup>1</sup> Oklahoma law provides that any contract for the purchase of goods or services entered into in the course of an unlawful prerecorded telephone call may be voided at any time by the telephone subscriber. 21 O.S. § 1847a. In addition to voiding the contract, I also explicitly terminate any inquiry or existing business relationship for the purposes of the TCPA.

to be local to me, and learned that they were engaged in a massive telemarketing campaign into Oklahoma as well as several neighboring states.

I made several calls over a period of approximately two weeks to Dish Network's legal department with the expectation that they would take steps to prevent their authorized agent from further unlawful, and indeed criminal<sup>2</sup>, marketing of their product, using their Dish Network trade name.

Dish Network's legal staff was initially unconcerned and claimed that they were not responsible for the acts of their agent, but I persisted and was eventually told that steps would be taken. However, I was able to confirm that the calls continued unabated. After subsequent call-backs to Dish Network's legal department in which I left voice mail messages inquiring as to their apparent inaction were not returned, I then filed suit in Cleveland County (Oklahoma) District Court against Dish Network as well as the local dealer, seeking damages, temporary injunctive relief, and permanent injunctive relief. Dish Network never entered an appearance and failed to answer my discovery requests.

To the best of my knowledge, the telemarketing dealer did not cease the practice of initiating prerecorded calls until he was subsequently sued by the Missouri Attorney General and the Oklahoma Attorney General and entered into an agreed judgment with the Oklahoma Attorney General to cease the practice.

On a separate occasion I received another flood of satellite television prerecords selling Dish Network service that I tracked to a company called I-Satellite, Inc. in Provo, Utah. After explaining the situation to Dish Network customer service, I was directed to their Retailer Services Department. The Retailer Services Department representative, even after being appraised of the numerous TCPA, Oklahoma Consumer Protection Act, and Oklahoma Criminal Code violations involved, was wholly unconcerned and didn't understand what my problem was. I later found out that a TCPA lawsuit had been filed against both I-Satellite and Dish Network the year before. Further, Dish Network filed a cross-claim against I-Satellite seeking indemnification. Yet, here I was receiving I-Satellite prerecorded calls for Dish Network some months later.

While investigating another series of calls I again played along with the prerecorded pitch, was transferred to a representative, and agreed to purchase Dish Network service. While I was on the phone, Dish Network checked my credit, which I knew because at the time I subscribed to an alert service that notified me when my credit file was accessed, and I was informed that an inquiry was made by "Echostar" (Dish Network) in Littleton, Colorado. Over a period of several weeks I corresponded with a woman in the Executive Office at Dish Network who acknowledged the hit in their database and the credit check, but could not readily identify the dealer. She had me fill out a telemarketing complaint form. The tone of the form seemed to be geared towards un-honored do-not-call requests and tended to put the onus on the consumer, and had no provision to report flat-out-unlawful unsolicited prerecorded solicitations or other TCPA violations such as lack of identification and valid Caller ID. In the end, in spite of Dish Network's system being used to pull my credit report, they claimed they were unable to identify the retailer, and would have to research further. After hearing nothing back after two weeks, I sent a follow-up email which remains unanswered.

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<sup>2</sup> Initiating unsolicited prerecorded sales calls to any telephone subscriber in Oklahoma is a criminal offense punishable by a fine and up to one year in jail. 21 O.S. § 1847a. Failing to identify the calling party in the course of a telemarketing call is a separate offense punishable by a fine and up to two years in the state penitentiary. 21 O.S. § 1861

### **MY EXPERIENCES WITH DIRECTV**

I have not had as many experiences with DirecTV as I have with Dish Network, but the experiences I have had with DirecTV aren't any better.

After going through the substantially similar steps to identify the party behind a flood of prerecorded calls, I ended up signing up with DirecTV. As soon as the installation appointment was made with the agent, I immediately called DirecTV customer service to cancel and I was given a name and telephone number for a dealer, but they could provide no address or any other information.

The representative was ready to end the call when I stopped her. She told me she had no procedure to deal with the dealer, nor did she offer to do anything on her own initiative, even though I explained that the calls involved numerous violations of the TCPA and criminal acts under Oklahoma law.

To make a long story short, I had to really press the issue and go through an extended phone runaround before I was eventually connected to a woman in the piracy department. Then it took a while to get her to understand what the problem was with a dealer using anonymous prerecorded call – at first she tried to turn the tables on me by talking about “fraudulent” signups initiated by “consumers like me,” leading me to believe that she has dealt with this kind of situation before. The DirecTV piracy department representative finally agreed to “take a report” but I never heard back. She also verified that DirecTV did not have an address or any other information for this dealer. The lead on the dealer, such as it was, was a dead-end.

Very, very few consumers have the tenacity to follow up on and investigate illegal calls, and when we do, we hit brick walls when we, in good faith (or naïveté), expect that a “reputable” company would be keenly interested in such reports and take decisive action. Clearly, DirecTV had not trained its personnel to be aware of the problem of the millions of illegal prerecorded calls being initiated in its name to sell its products or have any mechanisms in place to collect and act on such reports.

### **MY EXPERIENCES GENERALLY**

The current flood of prerecords is mostly for consumer debt reduction services and tax debt negotiation services, but it's the same pattern. No identification of the caller is provided in the prerecorded calls, the Caller ID is bogus if it's even sent at all. Telephone keypad options that purport to allow me to opt-out of further illegal calls don't work, if the option is even provided at all. Upon playing along and speaking to employees of the actual service company, it is undeniable that they are fully aware that they are speaking to a consumer just transferred from a prerecorded telephone solicitation. In my most recent investigation involving a tax debt relief service, upon confronting both management of the company as well as the tax attorney whose representation before the IRS would be secured through the company, no concern whatsoever was expressed about the unlawful calls. I am merely told by the company that “we didn't make the calls” and I'm told by the tax attorney that, “the company handles the marketing and I don't worry about it.” They referred me to a “lead generation” company which operates out of a rent-a-office, who in turn tells me that he subcontracted the actual calls to another call center which he never identified. When I try to follow-up a few weeks later, the call is answered by the rent-a-office staff who tells me that the lead generation company left and provided no forwarding address.

## CONCLUSION

I answer the Commission's specific questions as follows:

- 1) Under the TCPA, does a call placed by an entity that markets the seller's goods or services qualify as a call made on behalf of, and initiated by, the seller, even if the seller does not make the telephone call (*i. e.*, physically place the call)?

As a preliminary matter, I note that an artificial entity such as a corporation *cannot* physically place a call. Such entities can *only* initiate calls through their employees, agents, and contractors. (One could argue – and I have had defendants make comparable arguments in court – that *nobody* is physically placing the calls since it is done by machine).

Even though I have always operated under the premise that the TCPA is a strict vicarious liability statute, my personal ethics dictate that I would not attempt to hold responsible a truly innocent party, which is why I ask questions to satisfy myself of the seller's knowledge and gauge the response when I come to management with my concerns. However, in my 14 years' experience in pursuing telemarketers, I almost always satisfy myself that the seller is culpable, and I sleep well at night holding their feet to the fire.

My answer to this question is an unqualified **yes**, because the alternative would totally eviscerate the TCPA and the Commission's rules which regulate telemarketing.

Third parties such as authorized dealers, agencies, and "lead generators" exist because they are paid to generate sales for companies such as Dish Network and DirecTV<sup>3</sup>. Only these sellers are in a position to properly vet their dealers and agents and verify their compliance with telemarketing laws. As it is, they have little to no incentive to do so. Based on my experience, and from what I have heard from others, companies such as these will continue to give lip service as to their concerns about telemarketing violations while in reality fully expecting to reap the benefits of ongoing mass telemarketing campaigns that are undeniably conducted on their behalf.

Having owned and operated a small but successful business involving a third-party's highly sensitive intellectual property covered by restrictive agreements, and having other companies who resold my company's products which would also be subject to these agreements, I know a thing or two about contractual obligations, the consequences to myself and my employees if those obligations are breached, and, therefore, about properly vetting and monitoring those who sought to resell my products.

The same cannot be said for DirecTV, Dish Network, or the plethora of auto warranty sellers, debt reduction companies, mortgage companies, or any other business that finds its way into an illegal telemarketing vertical market, particularly if they are given an explicit free pass as they propose.

- 2) What should determine whether a telemarketing call is made "on behalf of" a seller, thus triggering liability for the seller under the TCPA? Should federal common law agency principles apply? What, if any, other principles could be used to define "on behalf of" liability for a seller under the TCPA?

As I have stated above, I have always has the understanding that the TCPA involved strict vicarious liability. This is based on the language at 47 CFR § 64.1200(d) and other official positions outlined by the

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<sup>3</sup> I use the major DBS satellite television providers here only as an example of a common illegal telemarketing vertical market.

Commission, as well as a number of court cases. For my own purposes, I have sought to hold sellers liable based on a “knew, should have known, or consciously avoided knowing” standard. Absent extraordinary circumstances, if there is any kind of agreement or relationship between a provider of products or services and a third party agent, retailer, contractor, or lead generator, the seller should be liable.

I thank the Commission for the opportunity to comment on this matter.

Respectfully submitted,

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